No. 06-1818

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PUBLIC CITIZEN HEALTH RESEARCH GROUP and THE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION,

Petitioners,

v.

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition for Review of a Final Rule Issued by the Occupational Safety and Health Administration, United States Department of Labor

REPLY BRIEF FOR PETITIONERS (FINAL)

Scott L. Nelson
DC Bar No. 413548
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, DC 20009
(202) 588-1000

Attorney for Petitioners

December 17, 2007

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Regulatory Materials:

Other:

INTRODUCTION AND SUMMARY OF ARGUMENT

OSHA does not dispute that its new Cr(VI) PEL leaves in place a greater risk of lung cancer for exposed workers than any standard it has ever issued under the OSH Act. Nor does OSHA dispute that its legal obligation under the Act is to eliminate significant risks to the maximum extent economically and technologically feasible for affected industries. And OSHA does not deny that its Cr(VI) PEL fails to achieve that objective for most of the industries covered by the rule, for which the agency's findings show a PEL of 1 $\mu g/m^3$ would be feasible.

The lawfulness of the rule thus hinges entirely on (1) the validity of OSHA's findings of technological infeasibility for three groups of industries or operations (welding, aerospace painting, and chromium pigment, dye and catalyst production) and economic infeasibility for one industry sub-group (job-shop electroplating);[1] and (2) OSHA's determination that the claimed infeasibility of a lower PEL for those four operations and industries requires a uniform PEL even for other industries that could meet a lower standard. Neither of those key elements of OSHA's decision can be sustained.

OSHA's feasibility findings fail the standard of review for OSH Act rulemakings because the facts found by OSHA do not meet the legal standards for

[1]OSHA has abandoned any defense of its technological infeasibility finding for hard-chrome plating.

technological and economic feasibility. In each of the industries or operations where OSHA says a lower standard would be technologically infeasible, the evidence *as analyzed by OSHA itself* shows that existing technology will allow typical employers to meet a lower PEL without respirators in most operations, most of the time—the longstanding legal standard for technological feasibility. In the one industry where OSHA found economic infeasibility, its findings and analysis provide no coherent explanation of how a lower standard would substantially alter the competitive structure of the industry—the well-established legal criterion for economic infeasibility.

A proper application of the standards for feasibility under the OSH Act belies OSHA's repeated statements that a lower PEL is infeasible for the majority of the 558,000 workers exposed to Cr(VI). OSHA supports that argument only by counting the standard as "infeasible" for *all* workers engaged in welding, even though it found that most welders *could* receive significantly greater protection without respirators. When OSHA's bootstrapping approach to the arithmetic is disregarded, it is evident that a lower standard would be feasible for the vast majority of affected workers.

Even if some or all of OSHA's feasibility conclusions could be sustained, however, OSHA's further decision to hold the PEL in other industries hostage to what can feasibly be achieved for welding, electroplating, and pigment, dye and

catalyst production is not justified by the agency's proffered explanations. A uniform PEL is not, as OSHA suggests, consistent with the reasoning of past rulemakings, and OSHA's stated reasons for adopting it run counter to both judicial decisions and prior agency rulemakings (in particular, the cadmium rulemaking). And OSHA's conclusory assertions that a non-uniform PEL would pose insuperable practical difficulties for the agency and affected employers are both implausible on their face and contradicted by the record.

Similarly, the agency has not provided adequate explanations for its adoption of an "action level" that is insufficient to identify operations that expose workers to substantial cancer risks, or for its unprecedented refusal to require employers to notify workers of all monitoring results. With respect to the action level, OSHA says no more than that it has always set action levels at half the PEL, without addressing the fact that the PEL in this case allows a higher degree of risk than any PEL OSHA has previously set for a workplace carcinogen. On the notice issue, by contrast, what OSHA omits is any effort to explain why it has adopted a rule that is *different* from all previous standards. That lack of explanation is especially glaring because the exceptionally high level of risk at the PEL in this case makes notice to workers of below-PEL monitoring results much *more* important than under other standards.

Finally, the arguments of the intervenors, who attempt to "defend" OSHA's standard by arguing that the agency's findings with respect to the risks of Cr(VI) and the feasibility of a lower standard were *mistaken*, must be disregarded. There may be many areas of dispute in the field of administrative law, but one proposition is crystal clear: An agency's action cannot be *sustained* on the ground that its reasoning was *wrong*.

ARGUMENT

I. OSHA Has Not Supported Its Infeasibility Findings.

Stainless-Steel Welding. OSHA does not contest that over 30 years of case law under the OSH Act states that the test of technological feasibility is whether there is a reasonable prospect that "a typical employer could achieve the PEL in most of its operations most of the time" using existing or anticipated technology. *Am. Iron & Steel Inst. v. OSHA*, 939 F.2d 975, 981 (D.C. Cir. 1991) (*AISI II*). Faced with the embarrassing fact that its findings with respect to welding do not establish that a typical employer in *any* industry will be unable to meet a PEL lower than 5 $\mu g/m^3$ in most operations, most of the time, OSHA argues that because the test for feasibility is not defined in the statute, this Court should defer to its construction of the test under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), rather than apply the test established by decades of judicial decisions.

Chevron deference, however, does not apply where a legal principle has received a clear and longstanding judicial construction that an agency seeks to alter. *See Maislin Indus., U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990); *see also Kutler v. Carlin*, 139 F.3d 237, 247 (D.C. Cir. 1998) (citing *Maislin* and *McClatchy Newspapers, Inc. v. NLRB*, 131 F.3d 1026, 1030 (D.C. Cir. 1997)). And, in any event, the agency's preamble did not purport to apply a new or different test for technological feasibility, and even OSHA's brief seems ambivalent on the subject, sometimes citing the standard test as formulated in *AISI II* and *United Steelworkers of Am. v. Marshall*, 647 F.2d 1189 (D.C. Cir. 1980) (*e.g.*, OSHA Br. 17, 36), and at other points arguing for deference to some largely unspecified, lesser standard (*e.g.*, OSHA Br. 39).

But even if, as OSHA advocates, a broad view of what constitutes an "industry" were adopted, OSHA has still failed to demonstrate that a typical *employer* in any industry would be unable to meet a lower standard in most operations, most of the time because of the claimed infeasibility problems involving welding. Indeed, OSHA's brief does not even attempt to make such a showing, arguing that welding operations should be considered in isolation, without regard to whether typical employers would be unable to meet a lower standard in *most* of their operations. OSHA Br. 41.

Even if the view is narrowed to welding operations, OSHA cannot evade its own inconvenient factual findings that most welding operations, and even most stainless-steel welding operations, could meet a 1 μg/m^3 PEL most of the time without respirators. As OSHA acknowledges, its findings show that only 41,365 of 269,379 welders, or 15.4%, would need respirators to meet a 1 μg/m^3 PEL,[2] only 22.3% of stainless-steel welders would require respirators at 1 μg/m^3, and only 29% of stainless-steel SMAW welders would need respirators to reach 1 μg/m^3. *See* PC Opening Br. 34. Only with respect to one operation, stainless-steel welding in confined spaces, did OSHA find that a 1 μg/m^3 PEL could not be achieved most of the time, but it has never suggested that most welding operations are in confined spaces. Moreover, OSHA has acknowledged that even a 5 μg/m^3 PEL will often not be met in confined-space welding without respirators, *see* NAM/SSINA Intervenor Br. 16, n.5, so the need for respirators in that operation does not make a 1 μg/m^3 PEL less feasible than OSHA's own 5 μg/m^3 PEL.

Because its own findings demonstrate that a lower PEL would be feasible in most welding operations, most stainless-steel welding operations, and most stainless-steel SMAW operations, most of the time, OSHA's position cannot be

[2]OSHA points out that in our opening brief, there was a typographical error in the number of welders who would need respirators at 1 μg/m^3, which was given as 31,365. PC Opening Br. 34, n.5. However, the percentage used in the brief, 15.4%, was correct because it was computed using the correct figure: 41,365.

sustained unless "most" means "less than one-third." Remarkably, that is what OSHA argues: Seizing on a phrase from *Steelworkers*, it contends that a standard is not feasible in most operations, most of the time if it requires more than "isolated" use of respirators. *See* OSHA Br. 43 (citing *Steelworkers*, 647 F.2d at 1272).

But *Steelworkers* did not declare that the standard for feasibility is whether respirator use would be "isolated." It said that "isolated" respirator use would not render a standard *infeasible*, but it made clear that the test for feasibility was whether the standard could be met in "most" operations, *not* "all but isolated operations." *See Steelworkers*, 647 F.2d at 1272. Subsequent decisions have emphasized that the standard is most operations, most of the time, *see AISI II*, 939 F.2d at 981, and have upheld as feasible standards that required significantly more than "isolated" respirator use. *See, e.g.*, *Building & Constr. Trades Dept. v. Brock*, 838 F.2d 1258 (D.C. Cir. 1988) (upholding feasibility standard requiring regular respirator use by 10% of 580,000 affected workers); *ASARCO, Inc. v. OSHA*, 746 F.2d 483 (9th Cir. 1984) (upholding feasibility of standard requiring "limited to moderate" respirator use in several of 16 affected smelters).

OSHA's cadmium standard is illustrative. There, the agency imposed a standard that would require use of respirators by 40,000 of 524,000 workers, with up to 80% of workers in some industries requiring respirators full-time. 57 FR

42102, 42212 (Sept. 14, 1992). OSHA contends that the cadmium standard supports its position because the agency actually found the standard *infeasible* for those industries where respirator use would be most extensive. OSHA Br. 44 n.14. That is only half the story. OSHA found it infeasible for those industries to meet the standard *without respirators*, but nonetheless required them to *use respirators* to meet it—*precisely the opposite of what it did here*. OSHA has not explained why the infeasibility of achieving a lower PEL without respirators for a *minority* of stainless-steel welders has led it not only to conclude that a lower standard is infeasible for *all* welders, but also to set a higher PEL for *all affected industries* when, in the cadmium standard, it refused to allow the infeasibility of reaching the PEL without respirators even for a *majority* of workers in some affected industries to dilute the protection it provided to affected workers.

When the proper legal standard is applied to OSHA's findings respecting welding, its reasoning for imposing a uniform 5 $\mu g/m^3$ PEL for all industries falls like a house of cards. OSHA's determination that a minority of welders could not achieve a lower PEL without respirators is the sole basis for its decision to call a lower PEL infeasible for all 269,379 welders, and it is only by counting all those welders that OSHA can sustain the fiction that a PEL lower than 5 $\mu g/m^3$ would be infeasible for most of the 558,000 workers exposed to Cr(VI). That fiction, in turn, is the principal basis for OSHA's decision to impose a uniform 5 $\mu g/m^3$ PEL on all

industries. Thus, OSHA's error in finding a lower PEL infeasible for welding even though most welders could reach 1 μg/m^3 most of the time without respirators (and many are already doing so), by itself, requires that the rule be remanded to the agency for further consideration of the feasibility of a lower standard.

Aerospace Painting. OSHA's attempt to defend its conclusion that a lower standard would not be feasible for aerospace painting operations fails to come to grips with the difficulty that OSHA's findings do not establish that a typical aerospace employer could not achieve a lower PEL in *most* operations, most of the time. At best, OSHA's findings establish that in *one* operation involving a minority of aerospace workers,[3] the industry will not be able to achieve a 1 μg/m^3 PEL without respirators. Although that may justify permitting employers to use respirators to comply with the standard (as OSHA has done in promulgating a special compliance rule for aerospace painting), it does not establish that a standard lower than 5 μg/m^3 would be infeasible. Put another way, the difference between the several hundred aerospace workers who will need respirators to reach 5 μg/m^3 and the few hundred more who would need respirators to reach 1 μg/m^3 does not make the lower standard infeasible in *most* aerospace operations.

[3]OSHA acknowledges that the preamble substantially overstated the number of aerospace painters. OSHA Br. 23 n.11.

OSHA claims to find our argument on this point "confusing," OSHA Br. 45, but its confusion stems from its myopic focus on the percentage of workers in a single aerospace operation (painting) who would require respirators if a lower PEL were adopted rather than on whether aerospace employers would be able to meet a lower PEL in *most* of their operations most of the time without respirators. The few hundred additional workers who would need respirators to meet a 1 $\mu g/m^3$ PEL may constitute a significant percentage of aerospace painters, but they are a small percentage of aerospace workers overall.

OSHA argues that in determining whether employers can meet the standard in most operations most of the time, the agency can consider only those operations where there is exposure to the substance that is subject to the PEL. *See* OSHA Br. 41. Even if this new twist on the feasibility standard were valid (and OSHA cites only a passage from *AISI II* that does not in fact support the proposition[4]), it would not assist OSHA's analysis of the aerospace industry because OSHA has not established that painting is the only aerospace operation that involves exposure to Cr(VI). Indeed, as the Aerospace Industry Association's intervenor brief observes, many aerospace operations involve some Cr(VI) exposure. AIA Br. 9-12. Thus,

[4]In *AISI II*, the court only had to examine operations where there was exposure, because it found that the industry could feasibly meet the standard in all those operations. It thus did not have to consider whether operations where the standard could *not* be met constituted "most" operations of a typical employer.

OSHA's finding that a majority of aerospace painters would require respiratory protection at 1 μg/m^3 does not establish that aerospace employers will be unable to meet that standard either in most of their operations, or even in most of their operations that involve Cr(VI) exposure.

Finally, even if OSHA's analysis could be said to establish the infeasibility of a lower standard for the aerospace industry (as opposed to merely establishing a need for respirators to meet a lower standard for some workers in the industry), the agency's findings with respect to this industry should not be considered in determining whether OSHA was justified in adopting a 5 μg/m^3 PEL across the board. OSHA's own decision to provide a different rule for aerospace painting (requiring employers only to achieve a 25 μg/m^3 exposure level through engineering controls and permitting them to reach 5 μg/m^3 with respirators) establishes that there are no practicality issues that necessitate that the standard for other affected industries be the same as for aerospace painting. Indeed, OSHA itself acknowledges that feasibility constraints in aerospace painting operations should not drive the PEL for other operations and industries, OSHA Br. 57, an admission that significantly undermines the agency's entire rationale for a uniform PEL.

Dye, Catalyst, and Pigment Production. OSHA misleadingly states that the only evidence on the technological feasibility of a PEL lower than 5 μg/m^3 in

existing facilities in these sectors was that a lead chromate pigment manufacturing facility in Canada did not have adequate space to install enclosures to reduce exposure. OSHA Br. 46. In fact, that was *not* the only evidence: Rather, as the Final Economic Analysis (FEA) explicitly states, there was evidence that at least one facility *in the U.S.* had *already* reduced exposures below 1 µg/m^3. JA 923 (FEA). Because a standard is technologically feasible even if "only the most technologically advanced plants in an industry have been able to achieve" it, *Steelworkers*, 647 F.2d at 1264, the demonstrated ability of plants in these industries to develop workable enclosure techniques to reduce exposure means that a standard lower than 5 µg/m^3 is technologically feasible.

OSHA nonetheless continues to assert that the "difficulty" an unknown number of plants *may* experience in reconfiguring or rebuilding their facilities to use available control technologies renders a lower standard technologically infeasible. But OSHA cites no case authority holding that the need to rebuild plants is an issue of technological rather than economic feasibility. OSHA invokes a portion of the *Steelworkers* opinion that it says "remanded OSHA's technological feasibility finding for lead pigment manufacturers, explaining that the agency had not sufficiently supported its conclusion that employers could meet the PEL by rebuilding their facilities." OSHA Br. 46-47 (citing *Steelworkers*, 647 F.2d at 1295). But the point there was not that *rebuilding* facilities was technologically

infeasible; rather, it was that even if employers rebuilt their plants, they still might not meet OSHA's standard, because OSHA had not demonstrated that the technology that would enable a rebuilt plant to comply was available.

Here, by contrast, OSHA's own findings demonstrate that there is no *technological* barrier to compliance by facilities that install proper controls (even if that does require reconfiguring or rebuilding existing facilities). As the court recognized throughout the *Steelworkers* opinion, if the technology is available, requiring employers to reconfigure facilities or build new ones is not a matter of technology, but one of cost—that is, a question of economic feasibility. *See* 647 F.2d. at 1283, 1295. Neither in its brief nor, more importantly, in the rule's preamble or the FEA, does OSHA attempt to offer a coherent explanation of how the need to rebuild, reconfigure, or relocate facilities is a *technological* issue.

Finally, even if the possible need to reconfigure facilities raised a technological issue, OSHA's brief fails to confront another fundamental problem: Its determination that a lower PEL would require only "intermittent" use of respirators by workers in these industries, JA 923-24 (FEA), is inadequate to support the conclusion that such a standard would be technologically infeasible. The need for *intermittent* use of respirators by only 206 workers (44% of total employees) in these three industries combined does not establish that most employers could not meet a lower standard in most operations *most of the time*.

Electroplating. OSHA does not defend its conclusion that a lower PEL is technologically infeasible for the electroplating industry because of the claimed difficulty of achieving lower exposures in hard-chrome plating. OSHA Br. 47 n.15. Because hard-chrome operations involve a small minority of electroplating workers, OSHA's finding that less than half of hard-chrome operations might require respirators to reach 1 $\mu g/m^3$ does not come close to establishing that a typical employer would be unable to achieve a lower standard in most operations most of the time.

OSHA continues, however, to assert that a lower PEL would be economically infeasible for job-shop electroplaters. OSHA's argument rests principally on its finding that compliance with a lower PEL would cost job-shop electroplaters 2.7% of revenues, which it says is "more than OSHA has ever deemed economically feasible in previous health standards." OSHA Br. 47. But that does not in itself establish infeasibility, because—as OSHA does not contest—OSHA has never considered costs as a percentage of revenues to be determinative, and did not purport to do so here.

Rather, as the court put it in *Steelworkers*, "[n]o matter how initially frightening the projected total or annual costs of compliance appear," the determinative factor is whether those costs would threaten the viability or "competitive structure" of the industry. 647 F.2d at 1265. OSHA admits that is

the standard. OSHA Br. 48. Although the agency here incanted the magic words "competitive structure," it provided no coherent explanation of how the costs would alter the competitive structure of the electroplating industry. As OSHA acknowledges, the sole explanation for the agency's conclusion was the finding that high compliance costs could not be avoided by other means (such as respirators) and the speculation that costs "*might* not be passed forward, particularly by older and less profitable firms." OSHA Br. 48 (quoting JA 203-04) (emphasis added). Even if this statement amounted to a finding that "older and less profitable firms" would actually go out of business, it is well established that a standard is *not* economically infeasible "even if it does portend disaster for some marginal firms." *AFL-CIO v. OSHA*, 965 F.2d 962, 982 (11th Cir. 1992). Thus, the concept of altering the competitive structure of an industry must mean something more than just that *some* firms *may* go out of business. Specifically, it means that enough firms will go under that concentration within the industry will be significantly altered or competition will be substantially affected. *See, e.g., AISI II*, 939 F.2d at 1003.

OSHA does not deny that in past rulemakings it analyzed the degree to which firms would likely go out of business and the resulting effect on concentration and pricing in an industry, nor does it contest that the preamble and FEA in this case are bereft of analysis of *how* the possible demise of some

marginal firms would alter competition within the electroplating industry. OSHA points only to the number of *pages* it devoted to the issue (only two in the FEA and fewer in the rule's preamble), and offers the excuse that it is not required to evaluate economic feasibility "in any particular way." OSHA Br. 49 (quoting *Steelworkers*, 647 F.2d at 1267). The language the agency quotes from *Steelworkers* recognizes the agency's discretion to rely on various types of economic data in determining economic feasibility, but it does not excuse the agency from analyzing the critical question of "whether the standard threatens the competitive stability of an industry … or whether any intra-industry or inter-industry discrimination in the standard might wreck such stability or lead to undue competition." *Steelworkers*, 647 F.2d at 1265. The agency *is* required, at least, to offer a coherent analysis of that question that does more than parrot the legal standard. *See Dry Color Mfrs. Ass'n v. Dept. of Labor*, 486 F.2d 98, 106 (3d Cir. 1973). OSHA has not done so.[5]

[5]OSHA's brief cites evidence in the rulemaking record that it says elaborates on the consequences of a lower PEL for the electroplating industry. But evidence in the record cannot substitute for findings and reasoning by the agency. The agency's action stands or falls on the agency's analysis, without which it cannot be known what evidence agency decisionmakers credited and what conclusions they drew from it. "'Even if the evidence in the record, combined with the reviewing court's understanding of the law, is enough to support the order, the court may not uphold the order unless it is sustainable on the agency's findings and for the reasons stated by the agency.'" *Moret v. Karn*, 746 F.2d 989, 992 (3d Cir. 1984) (quoting Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 14:29 (1980)).

II. Even If Its Infeasibility Findings Could Be Sustained, OSHA Has Failed to Justify Its Choice of a Uniform Standard When a Lower Standard Is Feasible for Most Industries.

OSHA contends that it has long rejected the use of different PELs for different industries, though it acknowledges that not all its standards have uniform PELs. *See* OSHA Br. 50. OSHA cites the arsenic standard as an early example of an agency finding that multiple PELs "would be extremely difficult to implement," OSHA Br. 50 (citing 43 FR 19583, 19601 (May 5, 1978)), but what OSHA actually said would be "extremely difficult to implement" in that rulemaking was a suggestion that it adopt different PELs for each *plant* within the same industry. *See* 43 FR at 19601. Thus, OSHA concluded in the arsenic rulemaking that it should consider feasibility for affected industries as a whole, *see id.*, which is precisely what petitioners advocate here.

OSHA similarly relies on a misleadingly truncated quotation from its benzene rulemaking, in which it adopted a uniform PEL for all industries. OSHA Br. 50 (quoting 43 FR 5918, 5947 (Feb. 10, 1978)). Although the preamble to the benzene rule briefly alluded to the possible administrative difficulties of multiple PELs, the principal basis for its choice of a uniform PEL was that although the agency had been able to identify *som*e operations in *some* industries that could *possibly* achieve lower exposure levels, the agency was unable "on the basis of the available evidence to make the determination" that a lower PEL could be achieved

in *any* industry, 43 FR 5947—a situation wholly unlike the circumstances here. Indeed, the considerations in the arsenic and benzene rulemakings are so unlike those here that OSHA's reliance on them in the Cr(VI) standard's preamble as support for a uniform PEL (*see* JA 240), without any recognition of the substantial differences between the cases, is itself arbitrary and capricious.[6]

Moreover, OSHA does not contest that *Industrial Union Dept. v. Hodgson*, 499 F.2d 467, 480 n.31 (D.C. Cir. 1975), and *Brock*, 838 F.2d at 1272-73, impose a burden of explanation if OSHA wishes to establish a uniform PEL that leaves in place a significant risk that can feasibly be eliminated in many industries, and hold that conclusory references to administrative convenience do not suffice to meet that burden.

Here, OSHA has failed to explain why the consideration that it found decisive in the cadmium standard—that workers should not be exposed to significant risks just because it might be infeasible to meet a lower standard in some *other* industry—is not decisive here. OSHA argues that in the cadmium rulemaking the industries that had feasibility issues were "easily identifiable and

[6]OSHA's brief also cites rulemakings regarding methylene chloride and 1,3-butadiene, but the cited portions of the preambles for those standards contain no consideration of the possibility of non-uniform PELs and no indication that large numbers of affected industries could achieve significantly lower levels. *See* 62 FR 1493, 1575 (Jan. 10, 1997) (methylene chloride); 61 FR 56745, 56794 (Nov. 4, 1996) (1,3-butadiene).

distinct," and that the same is not true here. OSHA Br. 57. OSHA's conclusory assertion that it is more difficult to identify the industries and processes for which OSHA has identified feasibility issues in this rulemaking than it was in the cadmium rulemaking is nowhere to be found in OSHA's preamble, which did not even attempt to distinguish the agency's reasoning in the cadmium rulemaking. As a post hoc rationalization by litigation counsel, the argument must be disregarded. *See W.R. Grace & Co. v. EPA*, 261 F.3d 330, 338 (3d Cir. 2001) ("Moreover, we may not accept appellate counsel's *post hoc* rationalizations for agency action. Put another way, an agency's order must be upheld on the same basis articulated in the order by the agency itself.").

In any event, the contention that the four industry groups or operations for which OSHA has found feasibility problems here are not "easily identifiable and distinct" cannot be squared with the rulemaking record. OSHA itself has determined that spray painting of large aircraft parts is identifiable and distinct enough to be treated separately in the standard, and in amending the rule to establish a special compliance option for which only job-shop electroplating firms are eligible, it has similarly determined that that industrial category can be adequately identified for separate regulatory treatment.[7] As for chromium

[7]As these examples illustrate, there is no need for OSHA to rely on "NAICS codes" (*see* OSHA Br. 28) to define industries or operations that might be subject to a different standard. Neither the special provision for aerospace painting in the

pigment, dye, and catalyst manufacturers, OSHA's FEA makes clear that these are highly discrete industrial categories involving only 12 facilities in the entire country employing fewer than 500 workers. JA 746, 763-64, 839. Finally, stainless-steel SMAW is a very specific welding operation that OSHA considered well-defined enough for a separate analysis of technological feasibility. *See* JA 917-20 (FEA). OSHA provides no reasoned explanation of why stainless-steel SMAW is an insufficiently "identifiable" operation to receive separate regulatory treatment (if a lower standard were actually infeasible for stainless-steel SMAW, which it is not).

OSHA also attempts to distinguish the cadmium standard because the PEL for cadmium was infeasible only for a minority of exposed workers. OSHA Br. 57. Again, this is a post hoc rationalization, and, again, it fails to distinguish the cadmium standard anyway. OSHA's actual determination in the cadmium rulemaking was that the standard was "infeasible" (in the sense that meeting it would require respiratory protection) for about 40,000 of 540,000 affected workers, or 7.4%—a minority, but hardly an insubstantial one. *See* 57 FR 42212.

---

final rule nor the amended rule offering a special compliance option for job-shop electroplaters uses NAICs codes. *See* JA 277 (aircraft painting exception); JA 293 (compliance option for job-shop electroplaters). Nor is there any reason to think such codes would be necessary to identify chromium pigment, dye or catalyst producers or stainless-steel welding operations.

Here, OSHA similarly determined that a roughly comparable minority of the 558,431 affected workers—53,123, or 9.5%—would require some use of respirators to meet a 1 μg/m^3 PEL. JA 335 (FEA). OSHA's assertion that a 1 μg/m^3 would be infeasible for a "majority" of workers (OSHA Br. 58) is based not on the actual number of workers who could not be protected to a level of 1 μg/m^3 without respirators, but on the total number who work in industries or operations where OSHA concluded a standard lower than 5 μg/m^3 was infeasible, including many tens of thousands for whom OSHA acknowledges a 1 μg/m^3 PEL could be (and is already being) reached without respirators.

OSHA's remaining reasons for using a uniform PEL are equally unpersuasive. OSHA contends that consideration of a non-uniform PEL would require it to determine "the precise level at which it would become infeasible to lower the PEL any further in each affected industrial sector," which it contends was "not possible in this Court-ordered expedited rulemaking." OSHA Br. 55. Petitioners are not demanding that OSHA do the impossible. Since OSHA is already required to do an industry-by-industry feasibility analysis, and typically carries out that analysis before settling definitively on a particular PEL, asking the agency to consider separately what exposure level each affected industry can feasibly meet adds little or nothing to its burden. And in any event, in *this* rulemaking (which was hardly "expedited"), OSHA's preliminary economic

analysis already provided a detailed feasibility analysis for its proposed 1 μg/m^3 PEL (as well as for alternative PELs of .5 and .25 μg/m^3), and the FEA and preamble altered OSHA's feasibility conclusions only with respect to the four industry groups and operations discussed above. Where OSHA's findings already support a lower PEL for all those industries where OSHA did not find feasibility problems with a 1 μg/m^3 PEL, it is not asking too much for the agency to act consistently with its own findings. OSHA's attempt to deny that it has in fact carried out the required analysis (OSHA Br. 55, n.18) is nothing less than revisionist history.

Finally, OSHA's insistence that separate PELs might pose practical problems for employers remains unconvincing. OSHA's brief makes no attempt to defend the agency's assertion that a disaggregated PEL would be "hard to understand." The only practical difficulty that it mentions is that stainless-steel welding operations may contribute to the Cr(VI) exposure of other welders working nearby. OSHA Br. 28. But OSHA points to no evidence that such proximity concerns would actually make it infeasible to protect any significant number of workers not directly engaged in stainless-steel welding to a level of 1 μg/m^3 or lower. Nor does OSHA explain why such concerns outweigh the very significant health risks OSHA's standard unnecessarily permits for tens of thousands of workers in industries where a lower standard is feasible.

III. OSHA Has Not Explained the Rule's Action Level and Employee Notification Provisions.

The Action Level. OSHA's defense of its action level rests principally on its contention that it has consistently used a level of one-half the PEL as the action level, and that the primary purpose of the action level is to ensure employers comply with the PEL. But OSHA acknowledges that the action level also has the purpose of giving employers incentives to reduce exposures below the PEL (OSHA Br. 59-60), and given that admission, OSHA's insistence that the action level must be set without regard to the degree of risk is illogical. Moreover, OSHA's brief, like its final rule, fails to come to grips with the acknowledged fact that this rule differs in two significant ways from prior rules: First, there is a much higher risk at the PEL, and thus at the action level; and second, there are many industries, employing tens of thousands of workers, that can achieve exposures substantially below both the PEL and the action level. OSHA's failure even to consider whether these considerations justify a lower action level renders its rule arbitrary and capricious. *See Consol. R. Corp. v. United States*, 855 F.2d 78, 92-93 (3d Cir. 1988) ("[A]n agency decision is arbitrary and capricious if the agency fails to 'articulate a satisfactory explanation' for its action or fails 'to consider an important aspect of the problem.'") (quoting *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

OSHA's speculation (OSHA Br. 61) that a lower action level might *discourage* employers from reducing exposures because monitoring costs are lower than control costs at lower exposure levels is just that—speculation. And it is illogical speculation at that, because if it is not cost-effective for employers to implement controls at lower exposure levels, the monitoring required by a lower action level would not make it any *less* likely that they would do so; rather, by increasing the costs attributable to sub-PEL exposure levels, the monitoring required by a lower action level could *only* provide an additional incentive to reduce exposures. In any event, OSHA's argument is a post-hoc rationalization not found in the preamble to the final rule and cannot serve as a defense of the rule. *See W.R. Grace*, 261 F.3d at 338.[8]

Employee Notice. As for the employee notification provision, OSHA does not deny that the Cr(VI) standard is the only standard it has ever promulgated that requires monitoring but compels employers to notify workers of results only if the PEL is exceeded. OSHA argues that the statute itself requires notification only of exceedances (OSHA Br. 61-62), but the agency does not assert that it lacks *authority* to require notification of all monitoring results (as it has consistently

[8]Moreover, OSHA's speculation is inconsistent with its own view that, except for those industries where it is infeasible to get below 5 $\mu g/m^3$, it is feasible for all remaining industries to achieve a level of 1 $\mu g/m^3$, well below the 2.5 $\mu g/m^3$ action level.

done in other standards). It offers no explanation of why the rule should be different for Cr(VI), nor does it explain why it changed the notification provision from the proposed rule, which would have required notice of all monitoring results.[9] That in itself makes the rule arbitrary and capricious under *State Farm*.

In what can only be described as a non sequitur, OSHA's observes that some other standards don't require monitoring at all (OSHA Br. 63), but that does not explain why *this* rule, alone among rules that *do* require monitoring, does not require notice to workers unless the PEL is exceeded. OSHA contends that workers still have an entitlement to seek access to monitoring results (OSHA Br. 62), but it does not explain why the right to seek out results is an adequate substitute for a rule requiring employers to provide them. The many other standards that require such notice reflect a conclusion that an access right alone is not enough. Finally, OSHA has no answer to the point that the primary difference between this standard and all previous ones—that under this standard there is much greater risk to workers at levels substantially *below* the PEL—makes it more, not less, important for workers to receive notice of below-PEL monitoring results.

[9]OSHA denies that the change from the proposed rule was unexplained (OSHA Br. 63), but it supports its position only by making the irrelevant observation that the proposed rule did not require monitoring for shipyards and construction. That is so, but it hardly explains why, at the same time the agency decided to require monitoring for all industrial sectors, it deleted the requirement that monitoring results be provided to employees.

OSHA's bald-faced assertion that there would be no health benefit to notifying workers of monitoring results below the PEL (OSHA Br. 62) ignores this critical fact.

IV. The Intervenors' Arguments Provide No Support for the Rule.

The intervenors devote most of their efforts not to defending OSHA's reasoning, but to asserting that a lower PEL is not necessary because OSHA overestimated the risks associated with Cr(VI) or erred in concluding that lower exposures were feasible for most industries. As OSHA's brief explains in responding to the Edison Electric Institute's challenge, however, OSHA's risk estimates were more than adequately supported by the wealth of evidence the agency considered, particularly in light of the deference due to the agency in resolving such technical questions in an area where scientific certainty is unattainable, as well as the need to err on the side of over-protection rather than under-protection where carcinogens are concerned. *See ASARCO*, 746 F.2d at 490 ("In the context of significant risk determinations, 'OSHA is not required to support its finding ... with anything approaching scientific certainty.'") (citation omitted).

Equally important, the agency's rule could not be upheld on the theory that its errors as to feasibility should be overlooked because the agency was also incorrect in assessing risk (even if that theory had any plausibility). The validity of

the agency's rule depends on the agency's reasoning, and it can be sustained only on "the agency's findings and for the reasons stated by the agency." *Moret v. Karn*, 746 F.2d at 992 (citation omitted). The intervenors' attempt to defend the rule by criticizing the agency must, therefore, be ignored.

Intervenor Color Pigments Manufacturing Association (CPMA) goes even further than the other intervenors, and not only seeks to defend the Cr(VI) rule on grounds contrary to OSHA's reasoning and findings, but also requests affirmative relief from the Court in the form of an order setting aside OSHA's refusal to exclude the pigments industry from the Cr(VI) rule. Again, OSHA's thorough explanation of its reasons for concluding that the forms of Cr(VI) used in the pigments industry pose as significant a risk as those used in other industries (*see* JA 58-65) would require rejection of CPMA's argument even if it were properly before the Court. But the Court need not address the argument because an intervenor-respondent cannot seek affirmative relief against aspects of the agency's decision not challenged by the petitioners.

CPMA neither petitioned for review nor even intervened in support of any of the industry petitions for review challenging the Cr(VI) rule. Rather, it moved to intervene only in opposition to our petition, and it expressly stated that it had made a considered choice not to file a petition for review and was "not petitioning the Court to modify the Final Rule." CPMA Reply in Support of Motion to Intervene,

at 5 (filed April 28, 2006). Except in "extraordinary cases," the federal courts have refused to allow intervenors who have forgone their own opportunity to petition for review to "expand the proceedings," but have limited them to "'join[ing] issue on a matter that has been brought before the court by another party.'" *Lamprecht v. FCC*, 958 F.2d 382, 389 (D.C. Cir. 1992) (quoting *Ill. Bell Tel. Co. v. FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990)); *see also Ill. Bell Tel. Co. v. FCC*, 740 F.2d 465, 477 (7th Cir. 1984); *Nat'l Ass'n of Regulatory Comm'rs v. ICC*, 41 F.3d 721, 729-30 (D.C. Cir. 1994); *U.S. Tel. Ass'n v. FCC*, 188 F.3d 521, 530-31 (D.C. Cir. 1999).[10] CPMA has pointed to no extraordinary circumstances justifying its attempt to expand the scope of these proceedings and bypass the statutory procedure for filing a petition for review.

CONCLUSION

The Court should remand the Cr(VI) standard for further consideration of feasibility, leaving the 5 $\mu g/m^3$ PEL in place pending completion of the rulemaking so that workers have at least that level of protection while the agency considers whether a more protective standard is required.

[10] As the D.C. Circuit has explained, the exceptional circumstances justifying a deviation from this rule include when the intervenor was unable to petition for review (because it prevailed before the agency) and where its argument was that the agency had exceeded its statutory jurisdiction. *Nat'l Ass'n of Regulatory Comm'rs*, 41 F.3d at 730.

Respectfully submitted,

/s/ Scott L. Nelson

Scott L. Nelson
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, DC 20009
(202) 588-1000

Attorney for Petitioners Public Citizen and Steelworkers

Date: December 17, 2007

COMBINED CERTIFICATION OF COUNSEL

I hereby certify that:

(1) I am a member of the bar of the United States Court of Appeals for the Third Circuit.

(2) The foregoing Brief for Petitioners complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief is composed in a 14-point proportional typeface, Times New Roman. As calculated by my word processing software (Microsoft Word 2003) the brief (not including those parts not required to be counted) contains 6,890 words.

(3) The text of the electronic brief is identical to the text in the paper copies.

(4) A virus detection program has been run on the file containing the electronic brief and no virus was detected. The virus protection program run was McAfee VirusScan, Engine Version 5100, DAT Version 5035.

(5) On December 17, 2007, I caused two copies of the foregoing Reply Brief for Petitioners (Final) to be served by first-class mail, postage prepaid, on counsel for all parties, as follows:

Lauren S. Goodman
United States Department of Labor
Office of the Solicitor
Room S-4004
200 Constitution Avenue, N.W.
Washington, DC 20210

Kathryn M.T. McMahon-Lohrer
Collier Shannon Scott, PLLC
3050 K Street, N.W.
Washington, DC 20007

Lawrence P. Halprin
Keller & Heckman LLP
1001 G Street, N.W.
Suite 500 W
Washington, DC 20001

Alan Charles Raul
Sidley Austin LLP
1501 K Street, N.W.
Washington, DC 20005

Glenn C. Merritt
Fitzpatrick & Merritt
90 West 40th Street
P.O. Box 1227
Bayonne, NJ 07002

Stephen C. Yohay
Thelen, Reid & Priest
701 8th Street, N.W.
Washington, DC 20001

/s/ Scott L. Nelson
Scott L. Nelson
Attorney for Petitioners

December 17, 2007